LIBRARY
SUPREME COURT, U. S.

Court, U.S.
FILED
JUL 6 1970
EDWARD B. BURGER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 222

CHARLES BAKER, ET AL.,
Petitioners,

vs.

F & F INVESTMENT CO., ET AL.,
Respondents.

SIDNEY CLARK, ET AL.,
Petitioners,

vs.

UNIVERSAL BUILDERS, INC., ET AL.,
Respondents.

BRIEF OF RESPONDENTS UNIVERSAL BUILDERS, INC., et al., IN OPPOSITION TO THE PETITION OF PLAINTIFFS-APPELLEES BELOW FOR WRIT OF CERTIORARI.

BURTON Y. WEITZENFELD,
LOUIS A. LEHR, JR.,
JOHN F. MCCLURE,
STANLEY M. LIPNICK,
120 South LaSalle Street,
Chicago, Illinois 60603,
Counsel for Respondents Universal Builders, Inc., et al.

ARNSTEIN, GLUCK, WEITZENFELD & MINOW,
120 South LaSalle Street,
Chicago, Illinois 60603,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

TABLE OF CONTENTS.

	PAGE
Opinions Below	2
Jurisdiction	2
Constitutional Provisions, Statutes, and Rules of Procedure Involved	3
Counterstatement of the Case	4
Argument	6
Part I: Elaboration of Jurisdictional Deficiencies.	6
Part II: Non-Jurisdictional Reasons Why This Petition Should Not Be Granted	7
A. Petitioners Have Not Raised a Question of Substance Under the Rules of Decision Act	7
B. This Court Should Not Again Consider Whether Nationally Uniform Substantive Rights Must Be Governed by Nationally Uniform Standards of Timeliness	9
C. This Court Need Not Consider the Alleged Intent of the Reconstruction Congress	10
D. Petitioners' Construction of the Illinois Doctrine of Laches Does Not Warrant Review by This Court	11
E. The Argued Applicability of the Federal Doctrine of Laches Does Not Warrant Review by This Court	12
F. This Court Should Not Consider the Construction of 42 U. S. C. § 1988 Urged by Petitioners	14
G. Petitioners Have Not Raised Any Substantial Question Under the Fifth and Fourteenth Amendments	16
Conclusion	18

Table of Citations.

Cases.

Alexander v. Cosden Pipe Co., 290 U. S. 484 (1934) ... 7
Alsop v. Riker, 155 U. S. 448 (1894) ... 9
Atchafalaya Land Co., Ltd. v. F. B. Williams Cypress Co., 258 U. S. 190 (1922) ... 8, 15
Beard v. Stephens, 372 F. 2d 685 (5th Cir. 1967) ... 11
Blakeslee's Warehouses v. City of Chicago, 369 Ill. 480, 17 N. E. 2d 1 (1938) ... 12
Campbell v. City of Haverhill, 155 U. S. 610 (1895) ... 15
Chattanooga Foundry and Pipe Works v. Atlanta, 203 U. S. 390 (1906) ... 11
Cope v. Anderson, 331 U. S. 461 (1947) ... 13
Cramp v. Board of Public Instruction, 368 U. S. 278 (1961) ... 7
Crawford v. Zeitler, 326 F. 2d 119 (6th Cir. 1964) ... 11
Czaplicki v. "S. S. Hoegh Silverclond", 351 U. S. 525 (1956) ... 9
Detroit Bank v. United States, 317 U. S. 329 (1943) ... 16
Flast v. Cohen, 392 U. S. 83 (1968) ... 7
Francis v. Crafts, 203 F. 2d 809 (1st Cir. 1953), cert. denied, 346 U. S. 835 ... 11
Guaranty Trust Co. of N. Y. v. United States, 304 U. S. 126 (1938) ... 13
Hawkins v. Barney's Lessee, 30 U. S. (5 Pet.) 457 (1831) ... 8
Hileman v. Knable, 391 F. 2d 596 (3d Cir. 1968) ... 11
Holmberg v. Armbrecht, 327 U. S. 392 (1946) ... 11, 12
Jones v. Mayer, 392 U. S. 409 (1968) ... 16, 17
Keyishian v. Board of Regents, 385 U. S. 589 (1967) ... 14
Lyons v. County of Morgan, 313 Ill. App. 296, 40 N. E. 2d 103 (3d Dist. 1942) ... 12

M'Cluny v. Silliman, 28 U. S. (3 Pet.) 270 (1830) 7
O'Neil v. Northern Colorado Irrigation Co., 242 U. S. 20 (1916) 16
O'Sullivan v. Felix, 233 U. S. 318 (1914) 7, 11, 14
Parmelee v. Price, 208 Ill. 544, 70 N. E. 725 (1904) 12
Russell v. Todd, 309 U. S. 280 (1940) 12, 13
Silber v. United States, 370 U. S. 717 (1962) 14
Smith v. Cremins, 308 F. 2d 187, 98 A. L. R. 2d 1154 (9th Cir. 1962) 11
Swan v. Board of Higher Education, 319 F. 2d 56 (2d Cir. 1963) 11, 13
Textile Workers Union v. Lincoln Mills, 353 U. S. 448 (1957) 9
Toledo Scale Co. v. Computing Scale Co., 261 U. S. 399 (1923) 3
United Auto Workers v. Hoosier Cardinal Corp., 383 U. S. 696 (1966) 7, 9, 10, 11, 14
United States v. Morris, 125 Fed. 322 (E. D. Ark., 1903) 16
Virginia Coupon Cases, 114 U. S. 270 (1884) 8, 15
Wakat v. Harlib, 253 F. 2d 59 (7th Cir. 1958) 11
Wilson v. Hinman, 172 F. 2d 914 (10th Cir. 1949), cert. denied, 336 U. S. 970, rehearing denied, 337 U. S. 927, rehearing denied, 338 U. S. 953 11
Wood v. Carpenter, 101 U. S. 135 (1879) 14

Federal Constitutional Provisions.

Article III, Section 2 .... 2, 3, 7
Amendment V 16
Amendment XIV 16

Federal Statutes.

15 U. S. C. § 15(b)—(Clayton Act, Statute of Limitations) 11
28 U. S. C. § 1292(b)—(Jurisdiction, Interlocutory Appeals) 5, 6
28 U. S. C. § 1343 (Jurisdiction, Civil Rights) 12
28 U. S. C. § 1652 (Rules of Decision Act) 7, 8, 16
28 U. S. C. § 2101(c)—(Supreme Court Jurisdiction, Time) 3
29 U. S. C. § 185 (Sec. 301, Labor Management Relations Act) 9
42 U. S. C. § 1982 (Civil Rights, Property) 16
42 U. S. C. § 1986 (Civil Rights, "Passive Accessories") 13
42 U. S. C. § 1988 (Civil Rights, Remedies) ... 13, 14, 15, 16
42 U. S. C. § 3612(a)—(Fair Housing Title, Civil Rights Act of 1968, Statute of Limitations) 13

Illinois Statutes.

1969 Ill. Rev. Stats., Ch. 83, Par. 16 (Sec. 15, Illinois Limitations Act) 12

Rules of Procedure.

Rules of the Supreme Court of the United States
Rule 34(2) 3, 4
Rule 40(d)(2) 14

Federal Rules of Civil Procedure
Rule 23(b)(3) 6
Rule 23(c)(3) 4, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 1653.

CHARLES BAKER, ET AL.,

Petitioners,

vs.

F & F INVESTMENT CO., ET AL.,

Respondents.

SIDNEY CLARK, ET AL.,

Petitioners,

vs.

UNIVERSAL BUILDERS, INC., ET AL.,

Respondents.

BRIEF OF RESPONDENTS UNIVERSAL BUILDERS, INC., et al., IN OPPOSITION TO THE PETITION OF PLAINTIFFS-APPELLEES BELOW FOR WRIT OF CERTIORARI.

The respondents here who were defendants-appellants below in *Sidney Clark, et al.* v. *Universal Builders, Inc., et al.*, oppose this petition for writ of certiorari which has been filed by plaintiffs-appellees below.

OPINIONS BELOW.

The two opinions of the District Court reported at 300 F. Supp. 210 and unofficially reported at CCH 1969 Trade Cases ¶ 72,754, and attached to the petition as Appendices B and C, respectively, were rendered in the case now known as *Charles Baker, et al.* v. *F & F Investment, et al.*, to which these respondents are not parties. The District Court orally stated that those opinions contained his reasoning applicable to these respondents.[1] A three-judge court, convened pursuant to 28 U. S. C. § 2281, rendered an unreported opinion on another aspect of this litigation, reprinted in full as Appendix C to these respondents' own petition for writ of certiorari to review the decision below, *Universal Builders, Inc., et al.* v. *Clark, et al.*, No. 1637, Oct. Term, 1969.

JURISDICTION.

This Court does not have jurisdiction to grant this petition because no petitioner and no member of the class is adversely affected by the judgment below. The court below held that none of them are barred by limitations. Hence, petitioners have no standing to appeal, and this petition does not present a "case" or "controversy" within the meaning of Article III, Section 2 of the Constitution of the United States. This jurisdictional objection is elaborated in Part I of the Argument, *infra*.

Respondents would also note an additional jurisdictional deficiency. Petitioners' application for extension of time for filing the petition, conditionally granted by Mr. Justice Marshall on April 8, 1970, should now be denied for failure to make application therefor at least ten days before the

1. Although the two cases were never consolidated in the District Court, they were then (but are no longer) assigned to the same judge.

end of the period sought to be extended, as required by this Court's Rule 34(2). The application expressly sought to extend a period ending on April 6, but was not mailed until April 1 (petition at 2, note), and no "most extraordinary circumstance" has been shown. Enforcement of this Court's Rule would render the petition out of time under 28 U. S. C. § 2101(c), which is jurisdictional. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 418 (1923).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES OF PROCEDURE INVOLVED.

Respondents' objections to this Court's jurisdiction to grant this petition involve the following provisions not presented in the petition:

(1) Constitution of the United States, Article III, Section 2, Clause 1:

> The judicial Power shall extend to all Cases, in Law and Equity arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

(2) 28 U. S. C. § 2101(c), 63 Stat. 104:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of

the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(3) Rule 34(2), Rules of the Supreme Court of the United States:

> Whenever any justice of this court or the clerk is empowered by law or under any provision of these rules to extend the time within which a party may petition for a writ of certiorari or docket an appeal or file any brief or paper, an application seeking such extension must be presented to the clerk within the period sought to be extended. Applications for extension of time to file petitions for certiorari or to docket appeals shall be submitted at least ten days before the expiration of the period sought to be extended and will not be granted except in the most extraordinary circumstance if filed during the last ten days of such period.

(4) Rule 23(c)(3), Federal Rules of Civil Procedure:

> The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

COUNTERSTATEMENT OF THE CASE.

Respondents incorporate by reference the Statement of the Case in their own petition in No. 1637, Oct. Term, 1969. In addition, respondents consider it essential to add the following, with regard to the proceeding below in which

they are parties, *Clark, et al.* v. *Universal Builders, Inc., et al.*:

The footnote at page 6 of this petition states that the District Court entered final orders of dismissal as to certain members of the plaintiff class. This statement is incorrect. The District Court ruled on the limitations question by denying respondents' motion to dismiss the claims of certain *named* plaintiffs (A. 76).[2] That was the *only* ruling covered by the District Court's findings authorizing interlocutory appeal under 28 U. S. C. § 1292(b)—(A. 76-77). The District Court's limitations reasoning was reflected in a simultaneous ruling permitting this action to be maintained on behalf of a class defined to exclude any persons whom the District Court thought would be barred by limitations (A. 76-77). No interlocutory appeal from the class action ruling was authorized.

Petitioners' summary of the acts which are claimed to be civil rights violations (petition at 5) makes it clear that these respondents are not alleged to have actually refused to deal with anyone because of race nor to have actually sold or offered to sell to anyone for different prices or on different terms because of race, as respondents previously noted at page 7 of their own petition in No. 1637.[3] Petitioners' summary, at page 5, of the relief they seek omits the complaint prayer for judgment "in the amount of the actual damages sustained by each of the plaintiffs and the members of the class" (A. 20).

---

2. The record below has been filed in No. 1637, Oct. Term, 1969. All references herein to that record are to the Appendix filed in the Seventh Circuit designated by the prefix "A".

3. The issue whether the complaint states a claim upon which relief may be granted was not before the Seventh Circuit.

ARGUMENT, PART I: ELABORATION OF JURISDICTIONAL DEFICIENCIES.

The Seventh Circuit's decision was rendered on interlocutory appeal from the District Court's limitations rulings *only. The District Court did not dismiss the claim of anyone on limitations grounds.* To the contrary, he denied respondents' motion to dismiss the claims of certain *named* plaintiffs whom respondents contend are barred by limitations (A. 76). Since this was the only ruling covered by the District Court's findings (A. 76-77) authorizing an interlocutory appeal under 28 U. S. C. § 1292(b), and petitioners are not adversely affected by the Seventh Circuit's judgment affirming the District Court, they have no standing to appeal. The class petitioners are authorized to represent does not include the persons whom the District Court believed barred by limitations (A. 77). This leaves petitioners devoid of authority to represent such persons as they now seek to do.

Having permitted this case to be maintained as a class action under Rule 23(b)(3), Federal Rules of Civil Procedure (petition, App. C, at App. 64), the District Court could not render an adjudication binding upon the absent "class members" without finding that notice had been given to the persons to be bound, that they are members of the class, and that they had not requested exclusion. Rule 23(c)(3), Federal Rules of Civil Procedure. No such findings were or could have been made because no notice had been given to class members when the limitations issues were decided by the District Court. Accordingly not even the persons excluded from the plaintiff class are adversely affected by the judgment below, because it is not an adjudication binding upon them, but only a legal precedent for such an adjudication in the future if they file suit (at which time they may resort to appellate procedures if they are held barred).

It is well settled that a "case" or "controversy", within the meaning of Article III, Section 2 of the Constitution, arises only when a claim is presented by a litigant having a personal stake in the outcome—someone who will personally be better off if his claim is successful. *E.g.*, *Flast* v. *Cohen*, 392 U. S. 83, 99 (1968); *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, 282-283 (1961); see also *Alexander* v. *Cosden Pipe Co.*, 290 U. S. 484, 487 (1934). There is nothing this Court can do for petitioners nor any member of the class defined by the District Court which will leave them better off than the Seventh Circuit's judgment that none of them are barred by limitations. Accordingly, petitioners lack standing to appeal that judgment sufficient to satisfy the Constitutional limitation upon this Court's jurisdiction.

ARGUMENT, PART II: NON-JURISDICTIONAL REASONS WHY THIS PETITION SHOULD NOT BE GRANTED.

A. Petitioners Have Not Raised a Question of Substance Under the Rules of Decision Act.

The Seventh Circuit carefully considered and followed *O'Sullivan* v. *Felix*, 233 U. S. 318 (1914), decisions following it of the First, Second, Third, Fifth, Sixth, Seventh and Ninth Circuits (cited at 420 F. 2d at 1193-1194 and also cited in note 7, *infra*), and the general and unbroken line of this Court's decisions from *M'Cluny* v. *Silliman*, 28 U. S. (3 Pet.) 270 (1830), to *United Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 696 (1966), all of which hold that, where a right of action arises under a federal statute not having a limitations provision, an appropriate forum state statute of limitations is adopted by the Rules of Decision Act, 28 U. S. C. § 1652.

Petitioners ask that *all* these decisions be overruled.

They contend (at 8-9) that the express exception in the Rules of Decision Act ("... where the Constitution ... of the United States or Acts of Congress otherwise require ...") precludes adoption of state statutes of limitations by that Act because, they argue, any requirement of timeliness is a deprivation of right. Petitioners rely solely upon the *Virginia Coupon Cases*, 114 U. S. 270 (1884), demonstrating their failure to recognize the dispositive distinction between a *complete* deprivation of *all* remedy as in *Virginia Coupon* and a requirement that available remedies be pursued within a reasonable time.

This Court has long held, contrary to petitioners' argument, that a reasonable timeliness requirement is not equivalent to a denial of right:

> "And such is the rationale of statutes of limitations. *They do not necessarily lessen rights* of property or impair the obligation of contracts. Their requirement is that the rights and obligations be asserted within a prescribed time. If that be adequate, the requirement is legal and its justice and wisdom have the testimony of the practices of the world." *Atchafalaya Land Co., Ltd.* v. *F. B. Williams Cypress Co.*, 258 U. S. 190, 197 (1922, emphasis supplied); see also *Hawkins* v. *Barney's Lessee*, 30 U. S. (5 Pet.) 457 (1831).

As these long-standing decisions hold, petitioners' contention that application of a statute of limitations equates with a denial of right is nothing new, has long since been considered and rejected by this Court, and does not now warrant review by this Court.

B. This Court Should Not Again Consider Whether Nationally Uniform Federal Substantive Rights Must Be Governed by Nationally Uniform Standards of Timeliness.

Petitioners argue (at 9-11) that a recently "expanded view" of federal law, evidenced by decisions of this Court that "many federal . . . causes of action . . . are to be governed by uniform federal rules", requires reexamination and reconsideration of whether "varying" state statutes of limitations should continue to govern the timeliness of federal actions based on Acts of Congress not having limitations provisions.[4] This argument was specifically considered and specifically rejected by this Court in *United Auto Workers* v. *Hoosier Cardinal Corp.*, 383 U. S. 606 (1966), in which a state statute of limitations was applied to bar an action under Section 301 of the Labor Management Relations Act, 29 U. S. C. § 185, to enforce a collective bargaining agreement.

This Court there expressly rejected a contention that the federal policy requiring nationally uniform substantive law in § 301 suits also required a nationally uniform standard of timeliness for bringing such suits, thereby precluding application of state statutes of limitations. 383 U. S. at 701-705.[5] This Court there noted the possibility of national

4. If there is a need for a uniform timeliness rule, it is strange that petitioners advocate a test of laches, which varies, not from state to state, but from case to case. *Czaplicki* v. *"S. S. Hough Silvercloud"*, 351 U. S. 525, 533 (1956); *Alsop* v. *Riker*, 155 U. S. 448, 461 (1894). The "cure" petitioners prescribe is worse than the "disease" they say exists.

5. Petitioners' attempt to distinguish away *Hoosier Cardinal* by footnoted argument (at 10) that § 301 of the Labor Management Relations Act is "merely" jurisdictional, and that the substantive law applied is state contract law, betrays their unfamiliarity with *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448, 456-457 (1957) in which this Court held to the contrary. Petitioners' apparent ignorance of *Lincoln Mills* is startling since it was specifically cited in *Hoosier Cardinal*.

policy being frustrated by a lack of uniformity in applying substantive law, while specifically rejecting the claim that such policy might be frustrated by a lack of uniformity in applying limitations. 383 U. S. at 701-703.

There is nothing which can be said of federal civil rights policy and the need petitioners assert for a nationally uniform standard of timeliness for asserting civil rights which was not considered and specifically rejected by this Court in *Hoosier Cardinal*. Accordingly, petitioners' reliance upon an "expanded view" of federal law and a need for "uniform federal rules" is only a rehash of an identical argument expressly rejected by this Court as late as 1966, and there is no need for this Court to consider the question again.

C. This Court Need Not Consider the Alleged Intent of the Reconstruction Congress.

Petitioners argue (at 10-11) that the draftsmen of the post-bellum civil rights acts could not have intended that federal courts "blindly" apply state limitations statutes to bar civil rights actions. This contention was made before the Seventh Circuit which responded:

> "The fact that the Civil Rights Acts grew out of the need to remedy prior abuses of state law and state officials fails to indicate that Congress intended private actions to remain ripe interminably *or that the federal courts could not be trusted to select appropriate state limitations statutes.*" 420 F. 2d at 1195. (Emphasis supplied.)[6]

6. Petitioners' reference (at 11, n.) to South Carolina's discriminatory 1865 statutes of limitations does not help them. The legislative history of the post-bellum civil rights acts does not suggest any Congressional apprehension that the Federal courts would apply to those statutes discriminatory or otherwise inappropriate state statutes of limitations.

Respondents would also note that the "relationship between Congress and the courts on the question of limitations provisions" and the related doctrine of Congressional acquiescence which this Court described in *Hoosier Cardinal*, 383 U. S. at 703-704 is fully applicable here.[7]

Accordingly, there is no merit in petitioners' contention that this Court should now examine general history of the Reconstruction period.

D. Petitioners' Construction of the Illinois Doctrine of Laches Does Not Warrant Review by This Court.

Petitioners contend (at 11) that the Seventh Circuit should have decided whether, as a matter of *state* law, limitations or laches would be applicable here, and suggest the latter (at 11, note). Respondents submit that the lower court correctly held that the choice between limitations and laches is a *federal* question (420 F. 2d at 1193, n. 3). See *Holmberg* v. *Armbrecht*, 327 U. S. 392, 395 (1946). This alone is dispositive of this part of petitioners' argument.

Furthermore, petitioners' analysis of Illinois law is incorrect. The three decisions upon which they rely (at 11, n.) say that laches governs suits "in equity", but do

---

7. Congress has not enacted a statute of limitations applicable to the civil rights statutes involved here even though state statutes of limitations have been held applicable to federal civil rights actions in, *e.g.*, *O'Sullivan* v. *Felix*, 233 U. S. 318 (1914); *Francis* v. *Crafts*, 203 F. 2d 809 (1st Cir. 1953), cert. denied, 346 U. S. 835; *Swan* v. *Board of Higher Education*, 319 F. 2d 56 (2d Cir. 1963); *Hileman* v. *Knable*, 391 F. 2d 596 (3d Cir. 1968); *Beard* v. *Stephens*, 372 F. 2d 685 (5th Cir. 1967); *Crawford* v. *Zeitler*, 326 F. 2d 119 (6th Cir. 1964); *Smith* v. *Cremins*, 308 F. 2d 187, 98 A. L. R. 2d 1154 (9th Cir. 1962); *Wakat* v. *Harlib*, 253 F. 2d 59 (7th Cir. 1958); *Wilson* v. *Hinman*, 172 F. 2d 914 (10th Cir. 1949), cert. denied, 336 U. S. 970, rehearing denied, 337 U. S. 927, rehearing denied, 338 U. S. 953. Compare, *e.g.*, *Chattanooga Foundry and Pipe Works* v. *Atlanta*, 203 U. S. 390 (1906) applying a state statute of limitations to a private antitrust suit and 15 U. S. C. § 15(b), with which Congress later indicated its desire for a federal timeliness rule for antitrust suits by enacting one.

not say *when* a suit *is* "in equity" for purposes of choosing between laches and limitations. The test to be applied when this choice must be made is the *source of the right of action*, and even an action seeking equitable relief is governed by limitations if based on a statutory right to sue; because a right *of statutory origin*, as the one asserted here, is a "civil action not otherwise provided for" within the meaning of Section 15 of the Illinois Limitations Act, now codified as 1969 Ill. Rev. Stats., Ch. 83, Par. 16. See *Parmelee* v. *Price*, 208 Ill. 544, 70 N. E. 725 (1904), where this limitations provision was applied to a creditor's bill *in equity* because the source of the right to sue was a statute. See also *Blakeslee's Warehouses* v. *City of Chicago*, 369 Ill. 480, 484, 17 N. E. 2d 1 (1938); *Lyons* v. *County of Morgan*, 313 Ill. App. 296, 40 N. E. 2d 103 (3d Dist. 1942). The cases cited by petitioners (at 11, n.) are inapplicable because they were all suits for breach of fiduciary obligations, which actions are *purely* of *equitable origin*.

For both of these reasons, petitioners' argument that laches should apply as a matter of Illinois law is without merit.

E. The Argued Applicability of the Federal Doctrine of Laches Does Not Warrant Review by This Court.

Petitioners argue (at 13-15) that, as a matter of *federal* law, laches rather than limitations must be applicable because the complaint seeks equitable relief. Petitioners rely on *Russell* v. *Todd*, 309 U. S. 280 (1940) and *Holmberg* v. *Armbrecht*, 327 U. S. 392 (1946). They are in error.

The *availability* of both legal and equitable remedies in civil rights actions (28 U. S. C. § 1343, 42 U. S. C. § 1988) renders the court's legal and equitable *jurisdiction*

concurrent, in which event the statute of limitations applicable to the legal remedy is applicable to entire action. *Cope* v. *Anderson*, 331 U. S. 461, 463-464 (1947); *Russell* v. *Todd*, *supra*, 309 U. S. at 289. This complaint prays for punitive damages (A. 20), and the petition (at 5) reaffirms the demand for this legal remedy.[8] Moreover, this rule is applicable to civil rights actions even when only equitable relief is sought. *Swan* v. *Board of Higher Education*, 319 F. 2d 56, 59n. (2d Cir. 1963), opinion by Mr. Justice Marshall while on the bench of that Court.

Accordingly, the federal doctrine of laches does not apply. This case is clearly controlled by *Cope* v. *Anderson*, 331 U. S. 461 (1947).

Petitioners also argue that laches should apply here because the five-year state statute applied by the lower courts is "short" and because, unless respondents prove actual prejudice at trial, the defense of limitations would be "arbitrary" and a "technicality, pure and simple" (petition at 15, 16). Petitioners' unsupported characterization of the five-year Illinois statute as "short" cannot withstand comparison of that period with the one-year and the six-month limitations periods which Congress itself applied to the civil rights statutes for which it did enact limitations provisions. 42 U. S. C. §§ 1986, 3612(a).

The other branch of petitioners' argument is equally untenable. The defense of limitations is *not* a "technicality", as petitioners contend, but "a meritorious defense, in itself serving a public interest", *Guaranty Trust Co. of N. Y.* v. *United States*, 304 U. S. 126, 136 (1938). Nor must respondents prove prejudice by passage of time. The

8. Respondents accept petitioners' concession (at 15) that no actual damages will be sought at trial except such sums as are contingent upon and directly result from reformation if awarded. Without that concession, the allegations of Paragraphs 15(e), (f), (g) and (h) of the complaint (A. 17-18) would constitute claims for actual damages not contingent upon reformation.

statute of limitations represents a conclusive presumption of prejudice, drawn by the legislature:

> ". . . While time is constantly destroying the evidence of rights, [statutes of limitation] supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and the antidote go together." *Wood* v. *Carpenter*, 101 U. S. 135, 25 L. ed. 807, 808 (1879).

For all of these reasons, petitioners' attempt to invoke the doctrine of laches does not warrant review by this Court.

F. This Court Should Not Consider the Construction of 42 U. S. C. § 1988 Urged by Petitioners.

This Court should not consider petitioner's argument (at 10-11) that Section 3 of the Civil Rights Act of 1866, 42 U. S. C. § 1988, prohibits application of state statutes of limitations to civil rights actions. This statute was in effect when this Court decided *O'Sullivan* v. *Felix*, 233 U. S. 318 (1914) and when the dozens of lower court cases following it (see 420 F. 2d at 1193-1194) were decided. Thus, the doctrine of Congressional acquiescence which this Court described in *Hoosier Cardinal*, 383 U. S. at 704, is clearly applicable.[9]

---

9. Nor should this Court summarily disregard *O'Sullivan* as petitioners suggest (at 13), even though the effect of 42 U. S. C. § 1988 may not have been argued. This Court has always been empowered to notice plain error not raised by the parties. See, *e.g.*, *Silber* v. *United States*, 370 U. S. 717 (1962); Rule 40 (d) (2) of this Court. If an existing federal statute precluded the result reached in *O'Sullivan*, the effect of such a statute could have been noticed to avoid plain error. *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967), upon which petitioners rely, is inapposite because it was an appeal from a state court challenging federal constitutionality of a state statute, and considerations of federal-

Moreover, Section 1988, by its express language, is inapplicable to limitations. It provides only that, in civil rights actions, existing federal law is to be used to supply remedies and punish offenses, and that, where existing federal law is deficient or not suitable, the courts are to look to existing state law for the same purposes. This statute is not concerned with the time within which the remedies it provides must be pursued. Petitioners here ask this Court to read into § 1988 something that simply is not there by arguing that application of the state statute of limitations "will bar the federal court from affording a remedy to some of the petitioners" (petition at 12), and they again confuse the total denial of a right with a reasonable limitation upon the time for its enforcement. See discussion of *Virginia Coupon* and *Atchafalaya Land*, *supra*, Part A of this Argument.

Furthermore, even if § 1988 could be said to apply to choosing an appropriate timeliness rule, the state statute of limitations would still be applicable here. There is no federal statute of limitations, and the federal doctrine of laches can not apply. Therefore, even § 1988 would require resort to the state timeliness requirement.

Nor is there any merit to petitioners' suggestion (at 12) that, under existing federal law, this action may be held subject to no requirement of timeliness. Such a contention was rejected long ago.

> "As was said by Chief Justice Marshall in Adams v. Woods, 6 U. S. 2 Cranch, 336, 342 [2, 298, 299], . . . 'This would be utterly repugnant to the genius of our laws. In a country within which not even treason can be prosecuted after the lapse of three years, it can scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture.'" *Campbell* v. *City of Haverhill*, 155 U. S. 610, 616 (1895).

---

state relations, do preclude this Court from considering such constitutional questions which were not raised before the state courts. No such considerations preclude this Court from considering unargued federal statutes when construing another federal statute.

For all of these reasons, review by this Court is not warranted.

G. Petitioners Have Not Raised Any Substantial Question Under the Fifth and Fourteenth Amendments.

Petitioners argue (at 16-17) that they could not have known they had a valid civil rights cause of action until this Court held in *Jones* v. *Mayer*, 392 U. S. 409 (1968), that state action is not an essential element of violation of 42 U. S. C. § 1982.[10] From this premise, they contend that, since this complaint was filed promptly after that decision, Fifth and Fourteenth Amendment rights of due process and equal protection would be violated if any of them are held barred by limitations.[11]

At the threshold of petitioners' argument is the tacit assumption that due process requires that no one be barred by limitations until a test case is decided by this Court upholding the particular cause of action involved. This is unsupportable. See *O'Neil* v. *Northern Colorado Irrigation Co.*, 242 U. S. 20 (1916). Nor did *Jones* v. *Mayer* reverse clear-cut prior law as petitioners' argument suggests. See 392 U. S. at 419-420, citing *United States* v. *Morris*, 125 Fed. 322 (E. D. Ark. 1903).

Finally, petitioners' contention that, until this Court decided *Jones* v. *Mayer*, they had no reason to believe they might maintain this action, is shown by this very record to be untenable as a matter of undisputed fact. The civil rights charges against respondents are made in a single count (A. 16) which *specifically alleges* that respondents:

---

10. These respondents deny that the claim here states a cause of action under *Jones* v. *Mayer*, but, as previously noted, the sufficiency of the complaint was not before the Seventh Circuit.

11. Petitioners fail to recognize that the Fourteenth Amendment is inapplicable to action by a federal court under a federal statute (Rules of Decision Act). See *Detroit Bank* v. *United States*, 317 U. S. 329, 337 (1943).

> ". . . acted under color of the laws of Illinois and of its municipalities, and under color of the custom and usage of residential racial segregation alleged above. They [respondents] also made use of the laws and customs of the State of Illinois, the County of Cook and the City of Chicago. . . ." (A. 11).

While respondents believe the factual allegations do not constitute state action as a matter of law, resolution of the question is unnecessary here.[12] Petitioners' own complaint allegations of state action refute the argument they now make, that they did not file a timely suit because they believed, until this Court decided *Jones* v. *Mayer*, that state action was required.

Therefore, this petition does not present any Constitutional question, and review by this Court is not warranted.

---

12. The District Court did not decide whether the allegations of state action are sufficient, considering resolution of that question unnecessary to decision of the issues then before it (A. 42, 75-76).

CONCLUSION.

This Court does not have jurisdiction to grant the petition. Even assuming jurisdiction, the petition does not raise any question of sufficient substance to warrant review by this Court. Accordingly, the petition should be denied.

Respectfully submitted,

BURTON Y. WEITZENFELD,
LOUIS A. LEHR, JR.,
JOHN F. MCCLURE,
STANLEY M. LIPNICK,
120 South LaSalle Street,
Chicago, Illinois 60603,
Counsel for Respondents Universal Builders, Inc., et al.

ARNSTEIN, GLUCK, WEITZENFELD & MINOW,
120 South LaSalle Street,
Chicago, Illinois 60603,
Of Counsel.